



6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY  
[FRL-9633-1]**

**California State Motor Vehicle and Nonroad Engine Pollution Control Standards; Truck Idling Requirements; Notice of Decision**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Decision.

**SUMMARY:** EPA has granted the California Air Resources Board (CARB) its request for a waiver of preemption and authorization to adopt and enforce California's Truck Idling Requirements. CARB's Truck Idling Requirements apply to new California-certified 2008 and subsequent model year heavy-duty diesel engines in heavy-duty diesel vehicles with a gross vehicle weight rating over 14,000 pounds, and to in-use diesel-fueled commercial vehicles with gross vehicle weight ratings over 10,000 pounds that are equipped with sleeper berths.

**DATES:** Petitions for review must be filed by **[INSERT DATE SIXTY DAYS AFTER FR PUBLICATION DATE OF THIS NOTICE]**.

**ADDRESSES:** EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2010-0317. All documents relied upon in making this decision, including those submitted to EPA by CARB, and public comments, are contained in the public docket. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's Web site is <http://www.epa.gov/oar/docket.html>. The electronic mail (e-mail) address for the Air and

Radiation Docket is: a-and-r-Docket@epa.gov, the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the [www.regulations.gov](http://www.regulations.gov) website, enter EPA-HQ-OAR-2010-0317 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality ("OTAQ") maintains a webpage that contains general information on its review of California waiver requests. Included on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

**FOR FURTHER INFORMATION CONTACT:** Kristien G. Knapp, Attorney-Advisor, Compliance and Innovative Strategies Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue (6405J), NW, Washington, DC 20460. Telephone: (202) 343-9949. Fax: (202) 343-2800. Email: [knapp.kristien@epa.gov](mailto:knapp.kristien@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. California's Truck Idling Requirements*

By letter dated May 9, 2008, CARB informed EPA that it had adopted its Truck Idling Requirements, and requested that EPA confirm that certain provisions of the requirements are not preempted by sections 209(a) of the Clean Air Act (Act); certain provisions are conditions

precedent pursuant to section 209(a) of the Act;<sup>1</sup> certain provisions are within-the-scope of previous waivers and authorizations issued pursuant to sections 209(b) and 209(e) of the Act, respectively; and at least one provision requires and merits a full authorization pursuant to section 209(e) of the Act.<sup>2</sup> CARB's 2008 Truck Idling Requirements became effective California state law on November 15, 2006, amending title 13, California Code of Regulations (CCR) sections 1956.8, 2404, 2424, 2425, and 2485.<sup>3</sup>

CARB's Truck Idling Requirements consist of three elements: (1) "new engine requirements" that require new California-certified 2008 and subsequent model year on-road diesel engines in vehicles with a gross vehicle weight rating (GVWR) greater than 14,000 pounds (*i.e.*, heavy-duty diesel vehicles or "HDDV"s) be equipped with a system that automatically shuts down the engine after five minutes of continuous idling; (2) "sleeper truck requirements" that require the operator of a sleeper truck to manually shut down the engine after five minutes of continuous idling; and (3) "alternative technology requirements" that establish in-use performance standards for HDDV operators who use alternative technologies to supply power for truck cab or sleeper berth climate control and/or other on-board accessories that otherwise would have been generated by the continuous idling of the truck's main engine.<sup>4</sup> CARB requests, first, that EPA confirm that its new engine requirements are not preempted by section 209(a) of the Act, or that they are other conditions precedent required prior to the initial sale of new heavy-duty diesel engines. Alternatively, CARB requests that if EPA concludes that

---

<sup>1</sup> EPA can confirm that a California requirement is a condition precedent to sale, titling, or registration, if: (1) the requirements do not constitute new or different standards or accompanying enforcement procedures, and (2) the requirements do not affect the basis for the previous waiver decision.

<sup>2</sup> California Air Resources Board (CARB) Letter to EPA regarding, "Requirements to Reduce Idling Emissions From New and In-Use Trucks, Beginning in 2008; Request for Confirmation That Certain Requirements are not Subject to Preemption Under Clean Air Act Section 209(a) or Fall Within the Scope of Previously Granted Waivers and Authorizations, and Request for New Authorization Under Section 209(e)(2)," EPA-HQ-OAR-2010-0317-0001.

<sup>3</sup> See California Air Resources Board (CARB), "Final Regulation Order," EPA-HQ-OAR-2010-0317-0011.

<sup>4</sup> See California Air Resources Board (CARB), "Waiver and Authorization Action Support Document," pp. 1-13, EPA-HQ-OAR-2010-0317-0002 (hereinafter "CARB Support Document").

the new engine requirements are preempted by section 209(a) of the Act, then EPA confirm that the requirements are within the scope of EPA's previously issued waiver for 2007 and later model year heavy-duty diesel engines. Second, CARB requests that EPA confirm that its sleeper truck requirements are purely operational controls, which are not preempted by section 209(a) of the Act. Third, CARB requests the following determinations from EPA with respect to its alternative technology requirements: (1) a within-the-scope confirmation for its requirement that an alternative power supply (APS) may only be operated if that engine has been certified to meet either applicable California off-road or federal nonroad emission standards and test procedures for its fuel type and power category;<sup>5</sup> (2) a full authorization for its requirement that a driver may not operate a diesel-fueled APS engine on a vehicle with a primary engine certified to the 2007 and subsequent model year standards unless the APS is certified to meet the applicable California or federal standard and meets one of three additional requirements;<sup>6</sup> and (3) a determination that its requirements pertaining to fuel-fired heaters, batteries, fuel cells, and power inverter/chargers for on-shore power are not preempted by section 209.

#### *B. Clean Air Act New Motor Vehicle Waivers of Preemption*

Section 209(a) of the Clean Air Act preempts states and local governments from setting emission standards for new motor vehicles and engines; it provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle

---

<sup>5</sup> CARB believes this requirement is within-the-scope of the previous authorization for new nonroad engine standards because that authorization already allows enforcement of California's requirement that any new APS engine acquired since the 2000 model year is required to meet the California or federal nonroad engine emission standards. *See* 75 FR 8056 (February 23, 2010).

<sup>6</sup> The additional requirements are one of the following: (a) exhaust routed into the truck's exhaust system and PM trap; (b) a level 3 verified PM control strategy; or (c) use of other procedures to demonstrate an equivalent level of emissions compliance.

engine, or equipment.

Through operation of section 209(b) of the Act, California is able to seek and receive a waiver of section 209(a)'s preemption. If certain criteria are met, section 209(b)(1) of the Act requires the Administrator, after notice and opportunity for public hearing, to waive application of the prohibitions of section 209(a). Section 209(b)(1) only allows a waiver to be granted for any State that had adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards (*i.e.*, if such State makes a “protectiveness determination”). Because California was the only state to have adopted standards prior to 1966, it is the only state that is qualified to seek and receive a waiver.<sup>7</sup> The Administrator must grant a waiver unless she finds that: (A) California's above-noted “protectiveness determination” is arbitrary and capricious;<sup>8</sup> (B) California does not need such State standards to meet compelling and extraordinary conditions;<sup>9</sup> or (C) California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.<sup>10</sup> EPA has previously stated that consistency with section 202(a) requires that California's standards must be technologically feasible within the lead time provided, giving due consideration of costs, and that California and applicable federal test procedures be consistent.<sup>11</sup>

The second sentence of section 209(a) of the Act prevents states from requiring, “certification, inspection or any other approval relating to the control of emissions from any new

---

<sup>7</sup> See S.Rep. No. 90-403 at 632 (1967).

<sup>8</sup> CAA section 209(b)(1)(A).

<sup>9</sup> CAA section 209(b)(1)(B).

<sup>10</sup> CAA section 209(b)(1)(C).

<sup>11</sup> See, *e.g.*, 74 FR 32767 (July 8, 2009); see also *Motor and Equipment Manufacturers Association v. EPA (MEMA I)*, 627 F.2d 1095, 1126 (D.C.Cir. 1979).

motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.” However, once EPA has granted California a waiver of section 209(a)’s preemption for emission standards and/or accompanying enforcement procedures, California may then require other such conditions precedent.<sup>12</sup> EPA can confirm that a California requirement is a condition precedent to sale, titling, or registration, if: (1) the requirements do not constitute new or different standards or accompanying enforcement procedures, and (2) the requirements do not affect the basis for the previous waiver decision.

In contrast to section 209(a)’s preemption of state adoption of standards controlling emissions from new motor vehicles and motor vehicle engines, section 209(d) of the Act explicitly preserves states’ ability to regulate vehicles and engines in use. Section 209(d) provides that despite section 209(a)’s preemption, “Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.”<sup>13</sup>

### *C. Clean Air Act Nonroad Engine and Vehicle Authorizations*

Section 209(e)(1) of the Act permanently preempts any State, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain new nonroad engines or vehicles. Section 209(e)(2) of the Act requires the Administrator to grant California authorization to enforce its own standards for new nonroad engines or vehicles, which are not listed under section 209(e)(1), subject to certain

---

<sup>12</sup> “Once California receives a waiver for standards for a certain class of motor vehicles, it need only meet the waiver criteria of section 209(b) for regulations pertaining to those vehicles when it adopts new or different standards or accompanying enforcement procedures. Otherwise, California may adopt any other condition precedent to the initial retail sale, titling, or registration of those vehicles without the necessity of receiving a further waiver of Federal preemption.” 43 FR 36680 (August 18, 1978).

<sup>13</sup> See also *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1094 (D.C.Cir. 1996).

restrictions. On July 20, 1994, EPA promulgated a rule that sets forth, among other things, the criteria, as found in section 209(e)(2), which EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards. On October 8, 2008, the regulations promulgated in that rule were moved to 40 CFR Part 1074, and modified slightly.<sup>14</sup> As stated in the preamble to the section 209(e) rule, EPA has historically interpreted the section 209(e)(2)(iii) “consistency” inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers).<sup>15</sup>

In order to be consistent with section 209(a), California’s nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California’s nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same “consistency” criteria that are applied to motor vehicle waiver requests. Pursuant to section 209(b)(1)(C), the Administrator shall not grant California a

---

<sup>14</sup> The applicable regulations, now in 40 CFR part 1074, subpart B, § 1074.105, provide:

(a) The Administrator will grant the authorization if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as otherwise applicable federal standards.

(b) The authorization will not be granted if the Administrator finds that any of the following are true:

(1) California’s determination is arbitrary and capricious.

(2) California does not need such standards to meet compelling and extraordinary conditions.

(3) The California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

(c) In considering any request from California to authorize the state to adopt or enforce standards or other requirements relating to the control of emissions from new nonroad spark-ignition engines smaller than 50 horsepower, the Administrator will give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

<sup>15</sup> See 59 FR 36969 (July 20, 1994).

motor vehicle waiver if she finds that California “standards and accompanying enforcement procedures are not consistent with section 202(a)” of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures are inconsistent with section 202(a) if: (1) there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

#### *D. Within-the-Scope Determinations*

If California amends regulations that were previously granted a waiver of preemption, EPA can confirm that the amended regulations are within the scope of the previously granted waiver. Such within-the-scope amendments are permissible without a full waiver review if three conditions are met. First, the amended regulations must not undermine California’s determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 202(a) of the Act. Third, the amended regulations must not raise any “new issues” affecting EPA’s prior waivers.

#### *E. Burden of Proof*

In *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (“*MEMA I*”), the U.S. Court of Appeals stated that the Administrator’s role in a section 209 proceeding is to:

consider all evidence that passes the threshold test of materiality and . . . thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver.<sup>16</sup>

---

<sup>16</sup> *MEMA I*, 627 F.2d at 1122.



The court in *MEMA I* considered the standards of proof under section 209 for the two findings related to granting a waiver for an “accompanying enforcement procedure” (as opposed to the standards themselves): (1) protectiveness in the aggregate and (2) consistency with section 202(a) findings. The court instructed that “the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.”<sup>17</sup>

The court upheld the Administrator’s position that, to deny a waiver, there must be ‘clear and compelling evidence’ to show that proposed procedures undermine the protectiveness of California’s standards.<sup>18</sup> The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.<sup>19</sup>

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for “standards,” as compared to accompanying enforcement procedures, there is nothing in the opinion to suggest that the court’s analysis would not apply with equal force to such determinations. EPA’s past waiver decisions have consistently made clear that: “[E]ven in the two areas concededly reserved for Federal judgment by this legislation – the existence of ‘compelling and extraordinary’ conditions and whether the standards are technologically feasible

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

– Congress intended that the standards of EPA review of the State decision to be a narrow one.”<sup>20</sup>

Opponents of the waiver bear the burden of showing that the criteria for a denial of California’s waiver request have been met. As found in *MEMA I*, this obligation rests firmly with opponents of the waiver in a section 209 proceeding:

[t]he language of the statute and its legislative history indicate that California’s regulations, and California’s determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.<sup>21</sup>

The Administrator’s burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated:

“here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as ‘arbitrary and capricious.’”<sup>22</sup> Therefore, the Administrator’s burden is to act “reasonably.”<sup>23</sup>

#### *F. EPA’s Administrative Process in Consideration of California’s Truck Idling Requirements*

Upon review of CARB’s request, EPA invited public comment on the entire request, including but not limited to the following issues.

First, we asked whether we should consider CARB’s new engine requirements as non-preempted operational controls, or as conditions precedent. In the alternative, should we determine that CARB’s new engine requirements must be treated as standards relating to the

---

<sup>20</sup> See, e.g., 40 FR 21102-103 (May 28, 1975).

<sup>21</sup> *MEMA I*, 627 F.2d at 1121.

<sup>22</sup> *Id.* at 1126.

<sup>23</sup> *Id.* at 1126.

control of emissions or accompanying enforcement procedures, we asked whether they be subject to and meet the criteria for EPA to confirm that they are within-the-scope of EPA's waiver for new heavy-duty diesel engines for 2007 and subsequent model years. To the extent the new engine requirements should be treated as standards relating to the control of emissions or accompanying enforcement procedures and require a full waiver from EPA, we asked whether the requirements meet the full waiver criteria.

Second, we asked whether CARB's sleeper truck requirements properly should be considered an operational control and thus not preempted by section 209 of the Act. To the extent that CARB's sleeper truck requirements should be treated as standards relating to the control of emissions from new motor vehicles or engines or accompanying enforcement procedures and require a full waiver from EPA, we sought comment on whether the requirements meet the criteria for a full waiver.

Third, with respect to CARB's alternative technology requirements, EPA sought comment on the following specific questions: (1) Does CARB's requirement that an APS using an internal combustion engine be certified to meet either California off-road or federal nonroad emission standards and test procedures meet the requirements for finding that it is within-the-scope of the authorization EPA issued for new nonroad engine standards, thus not requiring a full authorization?<sup>24</sup>; (2) If not, does CARB's requirement that an APS using an internal combustion engine be certified to meet either California off-road or federal nonroad emission standards and test procedures meet the requirements for a full authorization?; (3) Does CARB's requirement that a diesel-fueled APS engine be certified to the California or federal 2007 and subsequent

---

<sup>24</sup> 75 FR 8056 (February 23, 2010).

model year standards and meet one of three other listed requirements<sup>25</sup> meet the criteria for a full authorization?; and (4) Are CARB's requirements pertaining to fuel-fired heaters, batteries, fuel cells, power inverter/chargers for on-shore power, and truck electrification preempted under section 209 of the Clean Air Act, and if so, do they meet the requirements for waiver under section 209(b) or authorization under section 209(e)?

As called out by those specific questions, EPA sought threshold input on whether to treat various elements of CARB's Truck Idling Requirements as conditions precedent, within the scope of previous waivers and authorizations, not preempted by section 209, or in need of a full waiver or authorization. We also sought substantive comment on whether the various elements of CARB's Truck Idling Requirements meet the applicable criteria for confirmation as conditions precedent, within the scope, non-preemption, and full waiver or authorization.

In response to EPA's July 27, 2010 *Federal Register* notice, EPA received three written comments and no request for a public hearing. The written comments are from the American Trucking Associations ("ATA"),<sup>26</sup> the Owner-Operator Independent Drivers Association, Inc. ("OOIDA"),<sup>27</sup> and CARB.<sup>28</sup>

ATA's comments specifically oppose California's "alternative technology requirements," which establish in-use performance standards for HDDV operators who use alternative technologies (e.g., auxiliary power units) to supply power for truck cab or sleeper berth climate

---

<sup>25</sup> The additional requirements are one of the following: (a) exhaust routed into the truck's exhaust system and PM trap; (b) a level 3 verified PM control strategy; or (c) use of other procedures to demonstrate an equivalent level of emissions compliance.

<sup>26</sup> American Truck Associations ("ATA"), "Docket ID No. EPA-HQ-OAR-2010-0317," September 30, 2010, EPA-HQ-OAR-2010-0317-0017, September 30, 2010 (hereinafter "ATA Comments").

<sup>27</sup> Owner-Operator Independent Drivers Association Inc. ("OOIDA"), "Initial Comments of Owner-Operator Independent Drivers Association & Request for Additional Time to Provide Additional Comments," October 1, 2010 (hereinafter "OOIDA Comments").

<sup>28</sup> CARB, Additional Information to Support California's Request for Waiver and Authorization Actions for California's 2008 Truck Idling Requirements, and Response to Comments Submitted by Parties Opposing California's Waiver and Authorization Request; Docket ID No. EPA-HQ-2010-0317," EPA-HQ-OAR-2010-0317-1109, February 23, 2010 (hereinafter "CARB Supplemental Comments").

control and/or other on-board accessories that otherwise would have been generated by the continuous idling of the truck's main engine. ATA comments that those requirements are not consistent with sections 202(a) and 209(e) of the Clean Air Act.

OOIDA's comments address issues it believes have been overlooked by EPA, including "CARB's delay in requesting EPA review of Truck Idling Requirements without waiting for an EPA determination; CARB's premature implementation and enforcement of those Requirements without waiting for an EPA determination; and CARB's failure to consider the potential adverse impact of these requirements on the health and welfare of the affected truck drivers." OOIDA also suggested that the Truck Idling Requirements may be preempted by federal law other than the Clean Air Act. OOIDA also requested an additional forty-five days – until November 15, 2010 – to fully evaluate a recent decision by the United States Court of Appeals for the Ninth Circuit, *Association of American Railroads et. al. v. South Coast Air Quality Management District, et. al.*, case number 07-55804.<sup>29</sup> EPA did not formally extend the written comment period pursuant to this request, but did communicate to OOIDA that it would consider any written comments received before the Agency reached its final decision. OOIDA did not submit any further comments prior to EPA's final decision, published here today.

CARB submitted additional information in the form of supplemental comments to update its request in light of EPA's authorization of California's new nonroad compression-ignition regulations, and information regarding technological feasibility. CARB also responded to EPA's request for comments, and the comments EPA received from ATA and OOIDA. CARB's supplemental comments assert that ATA and OOIDA have failed to meet their burden of proof

---

<sup>29</sup> Association of American Railroads et. al. v. South Coast Air Quality Management District, et. al., case number 07-55804 (9th Cir. 2010), available at <http://www.ca9.uscourts.gov/datastore/opinions/2010/09/15/07-55804.pdf>.

for a denial. CARB further requests that EPA grant California its requested waiver and authorizations to adopt and enforce its Truck Idling Requirements.

## **II. Discussion**

California's Truck Idling Requirements feature four general sets of requirements: those applicable to new engines, those applicable to sleeper trucks, alternative technology requirements, and labeling requirements.

### **A. California's New Engine Requirements**

The new engine requirements imposed by California's Truck Idling Requirements establish two compliance options for new California certified 2008 and subsequent model year heavy-duty diesel engines installed in trucks with a gross vehicle weight rating greater than 14,000 pounds. The first compliance option requires engine manufacturers to install a system that automatically shuts down the engine after five minutes of continuous idle operation. The second compliance option is an optional NO<sub>x</sub> idling emission standard of 30 grams per hour.

CARB presents, first, that the new engine requirements are akin to operational controls on in-use vehicles and, accordingly, they are not preempted by Clean Air Act section 209(b). Alternatively, CARB argues that the new engine requirements are "other conditions precedent" to initial sale, titling, or registration that fall within the scope of the waiver of preemption EPA issued for California's 2007 and subsequent model year heavy-duty diesel engine standards. Last, CARB argues that should EPA determine that the new engine requirements constitute standards relating to the control of emissions from new motor vehicle engines, such requirements fall within the scope of previous waivers of preemption. Thus, EPA must first determine what type of control the California new engine requirements impose before proceeding with an

analysis of whether California meets the necessary Clean Air Act requirements under section 209.

To address these issues, EPA asked the first set of questions in the July 27, 2010 *Federal Register* notice. We asked whether we should consider CARB's new engine requirements as non-preempted operational controls, or as conditions precedent. In the alternative, we asked if we determine that CARB's new engine requirements must be treated as standards relating to the control of emissions or accompanying enforcement procedures, whether they be subject to and meet the criteria for EPA to confirm that they are within-the-scope of EPA's waiver for new heavy-duty diesel engines for 2007 and subsequent model years. To the extent the new engine requirements should be treated as standards relating to the control of emissions or accompanying enforcement procedures and require a full waiver from EPA, we asked whether the requirements meet the full waiver criteria.

### **1. Application of Section 209(b) Waiver Criteria**

EPA received no comments in response to the issues EPA raised for comment with respect to California's new engine requirements.

Despite CARB's contentions, EPA has determined that California's new engine requirements are standards relating to the control of emissions that require a full waiver of preemption from EPA. CARB believes that the United States Supreme Court's interpretation of "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines" in *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004) supports its position that the California new engine requirements are not standards relating to the control of emissions. To the contrary, EPA believes that the Supreme Court's interpretation supports the conclusion that California's new engine requirements should

be considered as standards relating to the control of emissions. The primary compliance option of the new engine requirements requires new 2008 and later model year heavy-duty diesel engines to be equipped with idling shutdown systems. CARB presents that the primary compliance option does not establish a numerical emission standard, and does not require additional emission control devices or design features related to the control of emissions. While it is clear that requiring a shutdown system does not establish a numerical emission standard, it is also clear that *requiring* manufacturers to design their engines with a shutdown system to control truck idling *emissions* does impose a requirement upon manufacturers, for the purpose of limiting emissions. Even though this requirement imposes itself as a design requirement and not as an emissions performance standard, it is nevertheless a requirement related to emission reduction. Furthermore, the Supreme Court in *EMA v. South Coast* explicitly contemplated that a “design feature related to the control of emissions” would be considered a standard relating to the control of emissions. Additionally, California’s optional NO<sub>x</sub> idling standard, as an alternative compliance option, makes clear what the force and effect of the new engine requirements is – to limit emissions from idling trucks by imposing a requirement on new engines. Thus, EPA has determined that California’s new engine requirements are standards relating to the control of emissions; and therefore, EPA has evaluated the new engine requirements by application of the full waiver criteria.

CARB alternatively requested that EPA evaluate California’s new engine requirements by application of EPA’s within-the-scope criteria. However, the new engine requirements impose an additional design requirement upon engine manufacturers, which is a “new issue” and cautions against application of the within-the-scope criteria. CARB believes its requirement that manufacturers include an engine shutdown system does not present a “new issue” because it



“will only require manufacturers to perform minor reprogramming of the software incorporated in existing engine or vehicle computers, and will not require any modifications to hardware.”<sup>30</sup>

In contrast, EPA believes that manufacturers existing designs do not factor into our analysis here.<sup>31</sup> EPA views the additional design requirement imposed upon manufacturers as a new regulatory issue, which was not considered in our previous waiver for California’s 2007 and subsequent model year heavy-duty diesel standards. Therefore, as stated above, we have applied the full waiver criteria to California’s request.

## **2. California’s Protectiveness Determination**

Section 209(b)(1)(A) of the Clean Air Act requires EPA to deny a waiver if the Administrator finds that California was arbitrary and capricious in its determination that its State standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards. When evaluating California’s protectiveness determination, EPA compares the stringency of the California and federal standards at issue in a given waiver request. That comparison is undertaken within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA previously found were not arbitrary and capricious.

When California adopted its Truck Idling Requirements, the CARB Board made its protectiveness finding in its Resolution 05-55.<sup>32</sup> That protectiveness determination was made against the background of California’s previous protectiveness determination for its 2007 and subsequent model year heavy duty diesel standards, which EPA previously found was not

---

<sup>30</sup> CARB Support Document at 31.

<sup>31</sup> Manufacturers current designs and system capabilities are more appropriately evaluated under the CAA section 209(b)(1)(C) technological feasibility criterion.

<sup>32</sup> CARB Resolution 05-55, EPA-HQ-OAR-2010-0008, “BE IT FURTHER RESOLVED that the Board hereby determines that the regulations adopted herein will not cause California motor vehicle emission standards, in the aggregate, to be less protective of the public health and welfare than applicable federal standards.”

arbitrary and capricious.<sup>33</sup> Compared to the federal standards, California’s 2007 and subsequent model year heavy-duty diesel standards are numerically equivalent. Furthermore, CARB asserts that it’s Truck Idling Requirements “in no way reduce the stringency of either the underlying exhaust emission standards or the associated test procedures.”<sup>34</sup> Notably, the new engine requirements California is imposing within its Truck Idling Requirements are an additional requirement beyond that which is required by EPA’s federal standards. Thus, CARB presents that EPA has “no basis for finding that CARB” made its protectiveness determination arbitrarily or capriciously.<sup>35</sup>

No commenter expressed an opinion or presented any evidence suggesting that CARB was arbitrary and capricious in making its above-noted protectiveness findings. Therefore, based on the record, EPA cannot find that California was arbitrary and capricious in its findings that California’s new engine requirements are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

### **3. California’s Need for State Standards to Meet Compelling and Extraordinary Conditions**

Under section 209(b)(1)(B) of the Act, EPA cannot grant a waiver if California “does not need such State standards to meet compelling and extraordinary conditions.” To evaluate this criterion, EPA considers whether California needs a separate motor vehicle emissions program to meet compelling and extraordinary conditions.

---

<sup>33</sup> 70 FR 50322 (August 26, 2005).

<sup>34</sup> CARB Support Document at 27.

<sup>35</sup> CARB Supplemental Comments at 6.

Over the past forty years, CARB has repeatedly demonstrated the need for its motor vehicle emissions program to address compelling and extraordinary conditions in California.<sup>36</sup> In its Resolution 05-55, CARB affirmed its longstanding position that California continues to need its own motor vehicle and engine program to meet its serious air pollution problems. Likewise, EPA has consistently recognized that California continues to have the same “geographical and climatic conditions that, when combined with the large numbers and high concentrations of automobiles, create serious pollution problems.”<sup>37</sup> Furthermore, no commenter has presented any argument or evidence to suggest that California no longer needs a separate motor vehicle emissions program to address compelling and extraordinary conditions in California. Therefore, EPA has determined that we cannot deny California a waiver for its new engine requirements under section 209(b)(1)(B).

#### **4. Consistency with Section 202(a) of the Clean Air Act**

Under section 209(b)(1)(C) of the Act, EPA must deny a California waiver request if the Agency finds that California standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. The scope of EPA’s review under this criterion is narrow. EPA has stated on many occasions that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California’s standards are technologically infeasible, or that California’s test procedures impose requirements inconsistent with federal test procedures. Previous waivers of federal preemption have stated that California’s standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate

---

<sup>36</sup> See, e.g., Approval and Promulgation of State Implementation Plans; California – South Coast, 64 FR 1770, 1771 (January 12, 1999). See also 69 FR 23858, 23881-90 (April 30, 2004) (designating 15 areas in California as nonattainment for the federal 8-hour ozone national ambient air quality standard).

<sup>37</sup> 49 FR 18887, 18890 (May 3, 1984); see also 76 FR 34693 (June 14, 2011), 74 FR 32744, 32763 (July 8, 2009), and 73 FR 52042 (September 8, 2008).

consideration to the cost of compliance within that time. California's accompanying enforcement procedures would be inconsistent with section 202(a) if the federal and California test procedures conflict, *i.e.*, if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.

California presents that its new engine requirements are currently technologically feasible, with appropriate consideration given to cost, and do not impose inconsistent certification requirements.<sup>38</sup> First, CARB presents information regarding the current technological feasibility of the engine shutdown compliance option: "The technology needed to comply with the new engine shutdown system option presently exists, and in fact has been widely available as a standard feature in most commercially available on-road heavy-duty engines."<sup>39</sup> CARB notes that a number of manufacturers already include such technology in their engines, but most fleet owners and operators do not activate it. For manufacturers who did not include such technology in their engines, CARB staff notes that only minor modifications would be needed. The costs associated with modifications, as estimated by CARB staff, are minimal – "\$100 per engine to cover additional administrative costs and minimal reprogramming costs."<sup>40</sup> Next, CARB presents information regarding the technological feasibility of the optional NO<sub>x</sub> idling standard.<sup>41</sup> Significantly, CARB notes that many manufacturers have either already certified to the optional NO<sub>x</sub> standard or intend to in future model years. These manufacturers have implemented strategies to meet the optional NO<sub>x</sub> idling standard without adding any additional hardware or modifications to their emission control systems or components. Manufacturers have certified to the standard merely by making modifications to

---

<sup>38</sup> CARB Support Document at 27.

<sup>39</sup> CARB Support Document at 28-29.

<sup>40</sup> *Id.* at 28; *see also* CARB, "Staff Report: Initial Statement of Reasons," EPA-HQ-OAR-2010-0317-0005, (hereinafter "ISOR"), at 37.

<sup>41</sup> CARB Support Document at 30.

their existing software (*e.g.*, by modifying exhaust gas recirculation rates and/or the pulse of the fuel injectors during idle operating modes). Last, CARB presents information regarding the effect of California's new engine requirements on manufacturers' existing certification requirements. CARB asserts that: "Neither the new engine shutdown system nor the optional NO<sub>x</sub> idling emission standard option present any issues of test procedure inconsistency because there are no analogous federal requirements."<sup>42</sup> CARB also confirms that manufacturers may conduct one set of tests to determine compliance with both California and federal requirements.<sup>43</sup>

No commenter expressed any disagreement with these statements from CARB, and no commenter presented any evidence opposing CARB's assertions regarding technological feasibility, lead-time, and cost of compliance. Therefore, EPA is unable to find that California's new engine requirements are not technologically feasible within the available lead-time, giving appropriate consideration to the cost of compliance.

## **5. Full Waiver of Preemption Determination for California's New Engine Requirements**

After a review of the information submitted by CARB and other parties to this proceeding, EPA finds that those opposing California's request have not met the burden of demonstrating that a waiver for California's new engine requirements should be denied based on any of the three statutory criteria of section 209(b)(1). For this reason, EPA finds that California's new engine requirements should receive a full waiver of preemption.

### **B. California's Sleeper Truck Requirements**

California's Truck Idling Requirements impose a new requirement on the operators of sleeper berth equipped heavy-duty diesel vehicles. Sleeper truck operators will now be required to manually shut off engines after five minutes of continuous idling. To address CARB's sleeper

---

<sup>42</sup> CARB Support Document at 31.

<sup>43</sup> *Id.*

truck requirements, EPA asked the second set of questions in the July 27, 2010 *Federal Register* notice. We asked whether CARB's sleeper truck requirements properly should be considered an operational control and thus not preempted by section 209 of the Act. To the extent that CARB's sleeper truck requirements should be treated as standards relating to the control of emissions from new motor vehicles or engines or accompanying enforcement procedures and require a full waiver from EPA, we sought comment on whether the requirements meet the criteria for a full waiver.

### **1. California's Sleeper Truck Requirements Do Not Require a Waiver from EPA**

California asserts that the sleeper truck requirements are an in-use operational control of motor vehicles and do not require a waiver of preemption. Since the sleeper truck requirements only apply to in-use motor vehicles, and Clean Air Act section 209(a) preemption only applies to new motor vehicles and engines, CARB asserts that section 209(a) preemption does not apply to these requirements. Additionally, CARB points towards section 209(d) of the Act, which states: "Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered vehicles." Read together, sections 209(a) and 209(d) make clear that operational controls, such as idling limits directed towards the operator of the vehicle, are not preempted and do not need a waiver of preemption pursuant to section 209(b). EPA agrees with this analysis and does not believe that in-use controls, such as idling limits, are preempted by section 209(a). Therefore, California's sleeper truck requirements do not require a waiver of preemption under section 209(b) of the Act.

### **2. Other Issues**

OOIDA comments that the sleeper truck idling requirements will have an adverse effect on the health and welfare of drivers. This comment is inapplicable to EPA's analysis here, because as stated above, EPA has found that the sleeper truck requirements are not preempted under section 209(a). Therefore, EPA has no authority to evaluate California's sleeper truck requirements. To the extent this comment suggests that California's protectiveness determination for its alternative technology requirements was arbitrary and capricious, we have addressed that issue below.

### **C. California's Alternative Technology Requirements**

CARB anticipated that truck operators would likely utilize alternative technologies to power truck cabins, sleeper berths, and/or other on-board accessories that previously would have been powered by the truck's main engine. Such alternative technologies include internal combustion engine powered alternative power sources ("APSs") and fuel-fired heaters. To account for the increased particulate matter (PM) emissions that would be generated by inclusion of these alternative technologies on heavy-duty diesel vehicles, CARB developed alternative technology requirements. CARB's general alternative technology requirement is that internal combustion engines used in APSs must be certified to the California or federal nonroad emission standards and test procedures applicable to the fuel type and horsepower category of the engines. CARB also imposes specific requirements for diesel-fueled APSs, dependent upon model year. For 2007 and later model year heavy-duty diesel trucks, a diesel-fueled APS must comply with California or federal nonroad emission standards and one of three additional requirements: (1) route their exhaust into the truck's exhaust system so that the APS's PM emissions are controlled by the truck's PM trap; or (2) be equipped with a level 3 verified PM control strategy (*i.e.*, achieve an 85 percent PM reduction efficiency); or (3) obtain advance CARB approval to use

other procedures to demonstrate an equivalent level of emission compliance. For 2006 and older model year trucks, diesel-fueled APS need only comply with the California or federal nonroad emission standards and test procedures applicable to the horsepower category of the engines.

With respect to CARB's alternative technology requirements, in the July 27, 2010 *Federal Register* notice, EPA sought comment on the following specific questions: (1) Does CARB's requirement that an APS using an internal combustion engine be certified to meet either California off-road or federal nonroad emission standards and test procedures meet the requirements for finding that it is within-the-scope of the authorization EPA issued for new nonroad engine standards, thus not requiring a full authorization?<sup>44</sup>; (2) If not, does CARB's requirement that an APS using an internal combustion engine be certified to meet either California off-road or federal nonroad emission standards and test procedures meet the requirements for a full authorization?; and (3) Does CARB's requirement that a diesel-fueled APS engine be certified to the California or federal 2007 and subsequent model year standards and meet one of three other listed requirements<sup>45</sup> meet the criteria for a full authorization?

### **1. Application of Full Authorization Analysis**

With respect to the threshold question EPA asked as to which waiver analysis to apply to CARB's APS requirements, EPA received no comments. CARB asserts that because its APS requirements are linked to preexisting federal or California standards and certification requirements, the new APS requirements are within the scope of the prior authorizations for these engines. However, EPA does not believe that a within-the-scope analysis is appropriate in this circumstance. In the past, EPA has reviewed amendments to previously waived or

---

<sup>44</sup> 75 FR 8056 (February 23, 2010).

<sup>45</sup> The additional requirements are one of the following: (a) exhaust routed into the truck's exhaust system and PM trap; (b) a level 3 verified PM control strategy; or (c) use of other procedures to demonstrate an equivalent level of emissions compliance.



authorized California standards for a determination of whether those amendments were within the scope of the previously waived or authorized standards. Here though, the APS requirements as imposed by California's Truck Idling Requirements are not amendments, but new regulations. Even though the APS requirements link to and rely upon previously authorized standards, they are newly applicable to all APS engines used in on-highway heavy-duty diesel vehicles, regardless of the model year of the engine. Because this is an additional requirement beyond that contemplated in previous nonroad and on-highway authorizations, EPA cannot apply its within-the-scope construct. Thus, we have reviewed all of California's APS requirements by application of our full authorization analysis.

## **2. California's Protectiveness Determination**

Section 209(e)(2)(i) of the Act instructs that EPA cannot grant an authorization if the agency finds that CARB was arbitrary and capricious in its determination that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards. CARB's Board made a protectiveness determination in Resolution 05-55, finding that California's Truck Idling Requirements will not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.<sup>46</sup> Furthermore, CARB asserts that "there is no question" its APS requirements are at least as protective of public health and welfare as applicable federal standards. To make this assertion, CARB highlights that EPA is authorized to regulate new nonroad engines, and only California may adopt emission standards and other emission-related requirements for in-use nonroad

---

<sup>46</sup> CARB Resolution 05-55, EPA-HQ-OAR-2010-0008, "BE IT FURTHER RESOLVED that the Board hereby determines, pursuant to section 209(e)(2) of the federal Clean Air Act, that the emission standards and other requirements related to the control of emissions adopted as part of this Airborne Toxic Control Measure are, in the aggregate, at least as protective of public health and welfare as applicable federal standards..."

engines.<sup>47</sup> Accordingly, CARB points out that EPA has not adopted any emission standards or other requirements applicable to in-use APS engines.

EPA received one comment challenging California's protectiveness determination with respect to the APS requirements. OOIDA comments that "in determining whether CARB's sleeper truck and alternative power source requirements should be approved, under any analysis, EPA should take care to fully consider and balance against the benefits to be gained by reducing emissions from idling sleeper trucks, the very real adverse impact such a requirement would have on the health and welfare of the operators of those trucks and negative effects on highway safety from truck operators not being properly rested."<sup>48</sup> CARB counters that "OOIDA's argument fails to present 'clear and compelling' evidence that California's protectiveness determinations are arbitrary and capricious; instead, it is only based on OOIDA's assumptions regarding the financial status and individual business decisions of numerous affected entities."<sup>49</sup> EPA's review of California's protectiveness determination is limited under section 209(e)(2)(i). The Agency's review is highly deferential to California; the Clean Air Act does not leave room for EPA to second-guess the wisdom of California's policy. Contrary to OOIDA's request, it is not EPA's role in this context to consider and balance the emissions benefits against the potential negative impacts on operator health and welfare and highway safety. Instead, EPA is charged with determining whether California made its protectiveness determination arbitrarily or capriciously. Furthermore, for a number of reasons, OOIDA has not met its burden to show that California should be denied authorization because it has been arbitrary and capricious in making its protectiveness determination. First, OOIDA's comments are primarily directed at California's sleeper truck requirements, which as discussed above are not even subject to the

---

<sup>47</sup> CARB Support Document at 34; *see* *EMA v. EPA*, 88 F.3d 1075 at 1089-1090.

<sup>48</sup> OOIDA Comments at 4.

<sup>49</sup> CARB Supplemental Comments at 10.

section 209(a) waiver and section 209(e) authorization provisions. Second, the issues OOIDA raises with respect to California's protectiveness determination are not the type of issues that EPA traditionally considers as part of its evaluation of California's protectiveness determination. When evaluating California's protectiveness determination, EPA traditionally compares the stringency of the California and federal standards at issue in a given waiver or authorization request. That comparison is undertaken within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA previously found were not arbitrary and capricious. EPA refrains from conducting a more detailed examination of the secondary or tertiary effects California standards may have on health and the environment. Such an undertaking would seemingly go beyond the review that Congress intended.<sup>50</sup> Considering OOIDA's comments within the context of EPA's traditional protectiveness evaluation provides no additional opportunity to question California's protectiveness determination because OOIDA provides no indication that California's standards are less stringent than comparable federal standards. Third, even if we were to take into account OOIDA's concerns, OOIDA's secondary "protectiveness" concerns do not present sufficient evidence to meet its burden of proof. OOIDA does not present any factual evidence or analysis of the specific health and welfare effects they expect to be caused by California's idling restrictions. Such evidence and analysis would be necessary to show that California's standards are less protective of health and welfare. Additionally, OOIDA does not dispute that California has presumed and allowed several avenues for drivers to use climate control and accessories during idling, particularly through the use of alternative power units. California also notes, in response to OOIDA, that it has provisions to allow extended idling during periods of extreme weather. Also, while OOIDA suggests that California's APS requirements are too expensive

---

<sup>50</sup> *MEMA I*, 627 F.2d at 1121.

(which is more an issue of technological feasibility, discussed below, not protectiveness), there is no question that California allows the use of power to deal with climate control in sleeper car cabins. In sum, based on full consideration and evaluation of the totality of information CARB has supplied and the assertions OOIDA has presented, EPA cannot find that California's protectiveness determination was arbitrary and capricious.

Therefore, based on the record before us, EPA finds that opponents of the authorization have not shown that California was arbitrary and capricious in its determination that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

#### **B. Need for California Standards to Meet Compelling and Extraordinary Conditions**

Section 209(e)(2)(ii) of the Act instructs that EPA cannot grant an authorization if the agency finds that California “does not need such California standards to meet compelling and extraordinary conditions . . . .” This criterion restricts EPA's inquiry to whether California needs its own mobile source pollution program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions.<sup>51</sup> As discussed above, for over forty years CARB has repeatedly demonstrated the need for its motor vehicle emissions program to address compelling and extraordinary conditions in California. In its Resolution 05-55, CARB affirmed its longstanding position that California continues to need its own motor vehicle and engine program to meet its serious air pollution problems. Likewise, EPA has consistently recognized that California continues to have the same “geographical and climatic conditions that, when combined with the large numbers and high concentrations of automobiles, create serious pollution problems.” Furthermore, no commenter has presented any argument or evidence to suggest that California no longer needs a separate motor vehicle emissions program

---

<sup>51</sup> See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889-18890 (May 3, 1984).

to address compelling and extraordinary conditions in California. Therefore, EPA has determined that we cannot deny California a waiver for its new engine requirements under section 209(e)(2)(ii).

### **C. Consistency with Section 209 of the Clean Air Act**

Section 209(e)(2)(iii) of the Act instructs that EPA cannot grant an authorization if California's standards and enforcement procedures are not consistent with section 209. As described above, EPA has historically evaluated this criterion for consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C).

#### **1. Consistency with Section 209(a)**

To be consistent with section 209(a) of the Clean Air Act, California's APS requirements must not apply to new motor vehicles or engines. California's APS requirements apply to nonroad engines, not new on-highway motor vehicles or engines. CARB presents that although the APS are used on on-highway heavy-duty diesel vehicles and engines, they are auxiliary engines and are not used to propel motor vehicles or engines. CARB further states that because APS are regulated as nonroad engines, they fall within the regulatory definition of nonroad engine, and are, thus, consistent with section 209(a). No commenter presented otherwise; therefore, EPA cannot deny California's request on the basis that California's APS requirements are not consistent with section 209(a).

#### **2. Consistency with Section 209(e)(1)**

To be consistent with section 209(e)(1) of the Clean Air Act, California's APS requirements must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB presents that APS engines are not used in locomotives and are not primarily used in farm and construction equipment vehicles. No

commenter presented otherwise; therefore, EPA cannot deny California's request on the basis that California's APS requirements are not consistent with section 209(e)(1).

### **3. Consistency with Section 209(b)(1)(C)**

The requirement that California's standards be consistent with section 209(b)(1)(C) of the Clean Air Act effectively requires consistency with section 202(a) of the Act. California standards are inconsistent with section 202(a) of the Act if there is inadequate lead-time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time. California's accompanying enforcement procedures would also be inconsistent with section 202(a) if the federal and California test procedures were not consistent. The scope of EPA's review of whether California's action is consistent with section 202(a) is narrow. The determination is limited to whether those opposed to the authorization or waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedure.<sup>52</sup>

#### **a. Technological Feasibility**

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.<sup>53</sup> Section 202(a)(2) states, in part, that any regulation promulgated under its authority "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Section 202(a) thus requires the Administrator to first determine whether adequate technology already exists; or if it does not, whether there is adequate time to develop and apply the technology before the standards go into

---

<sup>52</sup> *MEMA I*, 627 F.2d at 1126.

<sup>53</sup> H.R. Rep. No. 95-294, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 301 (1977).

effect. The latter scenario also requires the Administrator to decide whether the cost of developing and applying the technology within that time is feasible. Previous EPA waivers are in accord with this position.<sup>54</sup> For example, a previous EPA waiver decision considered California's standards and enforcement procedures to be consistent with section 202(a) because adequate technology existed as well as adequate lead-time to implement that technology.<sup>55</sup> Subsequently, Congress has stated that, generally, EPA's construction of the waiver provision has been consistent with congressional intent.<sup>56</sup>

With respect to the general APS requirements, CARB presents that the technological feasibility is readily apparent. CARB believes this because the general APS requirement is that the APS complies with the California or federal nonroad emission standards and test procedures applicable for its fuel type and power category. Therefore, EPA has already determined the technological feasibility for these standards, either in its own federal rulemaking or by authorizing the underlying California standards in a previous authorization.<sup>57</sup> No commenter challenges the technological feasibility of California's general APS requirements. Thus, EPA cannot deny California's request on the basis of technological feasibility.

With respect to the specific APS requirements for diesel APSs, CARB presents that each option is technologically feasible in the specified lead-time. Broadly, CARB asserts that "numerous technologies currently exist that can be used to comply with these requirements, including routing the exhaust from an APS into the exhaust system of the main engine, battery electric APSs, thermal energy storage systems, and on-shore electrical power infrastructures at

---

<sup>54</sup> See, e.g., 49 FR 1887, 1895 (May 3, 1984); 43 FR 32182, 32183 (July 25, 1978); 41 FR 44209, 44213 (October 7, 1976).

<sup>55</sup> 41 FR 44209 (October 7, 1976).

<sup>56</sup> H.R. Rep. No. 95-294, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 301 (1977).

<sup>57</sup> 60 FR 37440 (July 20, 1995), 65 FR 69763 (November 20, 2000), 68 FR 65702 (November 21, 2003), 71 FR 75536, and 75 FR 8056 (February 23, 2010).

truck stops.”<sup>58</sup> CARB also presents information regarding the technological feasibility of each of its compliance options. For the first option (routing a diesel APS’ exhaust upstream of the main engine’s diesel particulate trap), CARB provided information establishing technological feasibility in its Initial Statement of Reasoning, which went unchallenged in its Final Statement of Reasoning.<sup>59</sup> CARB also represents that at least one manufacturer applied for certification of a fully integrated APS and truck exhaust system for the 2008 model year.<sup>60</sup> For the second option (inclusion of a CARB-verified, level 3 PM control), CARB presented in its initial May 9, 2008 support document that it had several verification applications, and that the technology was feasible.<sup>61</sup> Since that time, CARB has conditionally verified three level 3 PM control strategies that can be applied to APSs.<sup>62</sup> For the third option (an equivalent compliance strategy), CARB provides several currently available technologies that are acceptable alternatives to the first two compliance options, including battery powered APSs, thermal energy storage systems, truck stop electrification, and off-board power infrastructure.<sup>63</sup> For each of the options for compliance with the specific requirements for diesel APSs, CARB asserts that it gave appropriate consideration to cost of compliance within the lead-time provided.

In its comments, OOIDA expresses concerns related to the cost of APSs on truck drivers. OOIDA believes that faced with the added expense of an APS, truck drivers will decide not to invest in APSs and “instead subject themselves to unhealthy and unsafe cab temperatures and conditions when hauling cargo in [California].”<sup>64</sup> Section 202(a) consistency calls for a limited review of technological feasibility, including a cost analysis of the cost of new technology, if

---

<sup>58</sup> CARB Supplemental Comments at 4.

<sup>59</sup> CARB, “Staff Report: Initial Statement of Reasons,” EPA-HQ-OAR-2010-0317-0005; CARB, “Final Statement of Reasons,” EPA-HQ-OAR-2010-0317-0010 (hereinafter “FSOR”).

<sup>60</sup> CARB Support Document at 40.

<sup>61</sup> CARB Support Document at 42.

<sup>62</sup> CARB Supplemental Comments at 4.

<sup>63</sup> CARB Support Document at 44.

<sup>64</sup> OOIDA Comments at 3.



technology does not currently exist; section 202(a) does not allow EPA to conduct a more searching review of whether the costs are outweighed by the overall benefits of the California regulations. In this case, APS technologies are in existence and are being used in actual operation. In addition, CARB responds to OOIDA's cost concerns in its supplemental comments.<sup>65</sup> First, CARB points out that its Truck Idling Regulations allow truck drivers to override idling shutoff systems during extreme weather conditions. More specifically, CARB points towards its administrative record for support of its cost analysis. During the California rulemaking, CARB staff determined that "the capital costs of [APS] technology could be recouped by truck owners or operators in as few as two and a half years, due to cost savings resulting from reduced fuel and truck maintenance costs."<sup>66</sup> CARB also relies on its APS cost estimates and response to comments regarding compliance costs.<sup>67</sup> CARB's rulemaking record with regard to cost effectively rebuts OOIDA's assertion that CARB "*simply assumes* that all drivers have the ability to invest thousands of dollars in anti-idling equipment...." (emphasis added). In any case, while OOIDA's comments may be relevant to whether an operator would choose to add the APS, they are not relevant to whether APS technologies are infeasible. As discussed above, these technologies are being used in practice and are clearly feasible.

EPA did not receive any other comments suggesting that CARB's standards and test procedures are technologically infeasible. Consequently, based on the record, EPA cannot deny California's authorization based on technological infeasibility.

#### **b. Consistency of Certification Procedures**

California's standards and accompanying enforcement procedures would also be inconsistent with section 202(a) if the California test procedures were to impose certification

---

<sup>65</sup> CARB Supplemental Comments at 10-11.

<sup>66</sup> CARB Supplemental Comments at 11.

<sup>67</sup> *Id.*; see ISOR Section VII and FSOR at 49-54.

requirements inconsistent with the federal certification requirements. Such inconsistency means that manufacturers would be unable to meet both the California and federal testing requirements using the same test vehicle or engine.<sup>68</sup>

CARB presents that none of the APS requirements pose any inconsistency as between California and federal test procedures. First, CARB asserts that its general APS requirements do not modify the test procedures specified for certifying a California or federal nonroad engine.<sup>69</sup> Second, CARB asserts that none of its three options to meet its APS requirements specific to diesel APS raise any issue with regard to test procedure consistency. For option 1, CARB again asserts that it does not alter test procedures specified for certifying a California or federal nonroad engine.<sup>70</sup> For options 2 and 3, CARB additionally points out no incompatibility issue can arise as between federal and California test procedures because EPA has no comparable federal standards or test procedures for CARB to conflict with.<sup>71</sup>

EPA received no comments suggesting that CARB's APS requirements pose a test procedure consistency problem. Therefore, based on the record, EPA cannot find that CARB's testing procedures are inconsistent with section 202(a). Consequently, EPA cannot deny CARB's request based on this criterion.

#### **4. Other Issues**

In its comments, ATA asserts that because California's APS requirements (those specific to diesel APSs on 2007 and subsequent model year heavy-duty diesel vehicles) apply to new diesel engines, they circumvent the consistency criteria of the Clean Air Act. ATA does not reference any of the sections of the Act which EPA has historically evaluated (*i.e.*, sections

---

<sup>68</sup> See, e.g., 43 FR 32182 (July 25, 1978).

<sup>69</sup> CARB Support Document at 38.

<sup>70</sup> CARB Support Document at 40.

<sup>71</sup> CARB Support Document at 45.

209(a), 209(e)(1), and 209(b)(1)(C)); instead, ATA generally challenges California’s ability to regulate APSs as inconsistent with federal standards. However, California’s ability to regulate APSs as either new or in-use engines, and depart from federal standards – is clearly grounded in section 209 of the Clean Air Act. California may regulate new nonroad engines pursuant to section 209(e)(2)’s authorization provision; and section 209(e) impliedly allows California to regulate in-use nonroad engines. Additionally, as CARB points out, ATA’s reliance on *Allway Taxi, Inc. v. City of New York*, is misplaced.<sup>72</sup> *Allway Taxi* concerned whether New York City could require emission controls for taxis in use. Those emission controls had not received a waiver of preemption, as New York City cannot receive one directly and at the time could not promulgate standards identical to California’s. The court ultimately found that New York City could promulgate those emission controls, although noting that controls that took effect “the moment after a new car is bought and registered ... would be an obvious circumvention of the Clean Air Act.” However, California has the authority to request a waiver of preemption (or authorization, for nonroad engines) for its standards under the Clean Air Act, and EPA has the authority to grant such request under section 209. *Allway Taxi* is not relevant to this separate authority. It is this separate authority that is the subject of this proceeding. Furthermore, EPA’s decision with respect to California’s Truck Idling Requirements is circumscribed by the waiver criteria set forth in sections 209(b) and 209(e) of the Act. ATA’s argument appears more directed at its policy goal of uniform idling regulations, but does not comport with the section 209 criteria, nor does it call into question any of EPA’s section 209 analysis. Congress has

---

<sup>72</sup> CARB Supplemental Comments at 12. (“Allway Taxi primarily addressed the issue of whether states and localities that are preempted by the Clean Air Act from regulating new motor vehicles could nevertheless regulate emissions from in-use motor vehicles. That issue is clearly distinguishable from California’s authority to adopt and to enforce standards for the nonroad engines in diesel-powered APSs. Unlike New York, California is expressly authorized by Congress to regulate both new and in-use nonroad engines (that are not conclusively preempted by section 209(e)(1) of the CAA) in diesel-powered APSs.”)

provided a mechanism for California to have standards that are more stringent than those in other states, and ATA's argument seems to neglect this clear authority.

ATA also contends that EPA cannot grant a new authorization for California's APS requirements (again, those specific to diesel APSs on 2007 and subsequent model year heavy-duty diesel vehicles) because "CARB has not complied with the lead time and stability requirements of section 202(a)(3)(C)" of the Clean Air Act. This comment also does not comport with the section 209 criteria. California must take lead-time into account, and EPA must consider lead-time when evaluating California's regulations pursuant to section 209(e)'s consistency requirements. However, the lead-time inquiry EPA undertakes relates to technological feasibility. Specifically, consistency with section 202(a) requires the Administrator to first determine whether adequate technology already exists; or if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect.<sup>73</sup> Congress has stated that, generally, this construction accords with congressional intent.<sup>74</sup> With respect to California's specific APS requirements for diesel APSs used on 2007 and later model year heavy-duty diesel vehicles, California demonstrated that all three compliance options are currently technologically feasible. No party – including ATA – presented otherwise. EPA then has no further inquiry into lead-time, because no additional requirement is imposed by the section 209 criteria.

## **5. Authorization Determination for California's APS Requirements**

After a review of the information submitted by CARB and other parties to this proceeding, EPA finds that those opposing California's request have not met the burden of

---

<sup>73</sup> EPA notes that even if the language in section 202(a)(1)(C) were relevant to its consistency analysis, that section by its own terms applies only to standards applicable to emissions from new heavy-duty on-highway motor vehicle engines, not the nonroad engines being regulated by California.

<sup>74</sup> H.R. Rep. No. 95-294, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 301 (1977).

demonstrating that a waiver for California's APS requirements should be denied based on any of the three statutory criteria of section 209(e)(2). For this reason, EPA finds that California's APS requirements should be authorized.

#### **D. Fuel-Fired Heater Requirements**

California's Truck Idling Requirements also impose emission requirements on fuel-fired heaters. Fuel-fired heaters provide heat to truck cabs or sleeper berths and/or preheat engine blocks during cold weather. Fuel-fired heaters on 2007 and later model year trucks operating in California may now only operate fuel-fired heaters that comply with California's second generation of low emission vehicle (LEV II) regulations.

With respect to CARB's fuel-fired heater requirements, in the July 27, 2010 *Federal Register* notice, EPA sought comment on the following question: Are CARB's requirements pertaining to fuel-fired heaters, batteries, fuel cells, power inverter/chargers for on-shore power, and truck electrification preempted under section 209 of the Clean Air Act, and if so, do they meet the requirements for waiver under section 209(b) or authorization under section 209(e)?

CARB presents that its fuel-fired heater requirements are not preempted and, accordingly, do not require an authorization.<sup>75</sup> CARB asserts that because fuel-fired heaters are neither nonroad engines nor vehicles, they are not subject to section 209(e) preemption. EPA received no comments suggesting that CARB's fuel-fired heater requirements are subject to section 209(e) preemption. EPA confirms that fuel-fired heaters are not nonroad engines or vehicles, and are therefore not preempted under section 209(e) of the Clean Air Act.

#### **E. California's Truck Idling Labeling Requirements**

Engine manufacturers, original equipment manufacturers (OEMs), and internal combustion APSs manufacturers, as applicable, are required to produce and affix permanent

---

<sup>75</sup> CARB Support Document at 45.

labels to the hood of the truck. These labels are intended to assist CARB enforcement staff in clearly and easily identifying diesel trucks that comply with the California Truck Idling Requirements. As stated above, EPA is today issuing a waiver of preemption for the new engine requirements and an authorization for the APS requirements. California's engine and optional NO<sub>x</sub> idling labeling requirements, which accompany the new engine requirements, are therefore included in the waiver of preemption for the new engine requirements. Similarly, California's auxiliary power system labeling requirements, which accompany the APS requirements, are therefore included in the authorization for the APS requirements.

## **F. Other Issues**

OOIDA's comments present two other issues that generally challenge California's Truck Idling Requirements. First, OOIDA asserts that CARB should be prohibited from enforcing its Truck Idling Requirements until EPA approves them. Second, OOIDA asserts that federal laws other than the Clean Air Act may preempt California's Truck Idling Requirements. As EPA has stated on numerous occasions, sections 209(b) and 209(e) of the Clean Air Act limit our authority to deny California requests for waivers and authorizations to the three criteria listed therein. As a result, EPA has consistently refrained from denying California's requests for waivers and authorizations based on any other criteria.<sup>76</sup> In instances where the U.S. Court of Appeals has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the Court has upheld and agreed with EPA's determination.<sup>77</sup> Neither of the issues OOIDA raises is among – or fits within the confines of – either explicitly or implicitly, the criteria listed under sections 209(b) and 209(e).<sup>78</sup> Therefore, in considering California's Truck Idling Requirements, EPA has not considered these issues.

## **III. Decision**

The Administrator has delegated the authority to grant California section 209(b) waivers of preemption and section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating CARB's Truck Idling Requirements, CARB's submissions, and the public comments from ATA and OOIDA, EPA is taking the following actions. First, EPA is

---

<sup>76</sup> See, e.g., 74 FR 32744, 32783 (July 8, 2009).

<sup>77</sup> See *Motor and Equipment Manufacturers Ass'n v. Nichols*, 142 F.3d 449, 462-63, 466-67 (DC Cir.1998), *Motor and Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1111, 1114-20 (DC Cir. 1979).

<sup>78</sup> OOIDA may raise these issues in a direct challenge to California's regulations in other forums, but these issues are not relevant to EPA's limited review under section 209.

granting a waiver of preemption to California for its new engine requirements. Second, EPA is granting an authorization to California for its auxiliary power system requirements.

My decision will affect not only persons in California, but also manufacturers outside the State who must comply with California's requirements in order to produce vehicles for sale in California. For this reason, I determine and find that this is a final action of national applicability for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by **INSERT DATE SIXTY DAYS AFTER FR PUBLICATION DATE OF THIS NOTICE**. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

#### **IV. Statutory and Executive Order Reviews**

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. § 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. § 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. § 804(3).

Dated: February 8, 2012.



Gina McCarthy, Assistant Administrator  
Office of Air and Radiation

[FR Doc. 2012-3690 Filed 02/15/2012 at  
8:45 am; Publication Date: 02/16/2012]